Supreme Court, U. S.
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No. 80-427

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

FAIR ASSESSMENT IN REAL ESTATE ASSOCIATION, INC., et al.,
Petitioners,

v.

GENE McNARY, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENTS WILLIAMS, OTTO AND SNYDER IN OPPOSITION TO PETITION FOR CERTIORARI

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INDEX

Page

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statutes Involved 2

Statement of the Case 2

Argument:

I. The petition for certiorari should not be granted for the reason that the petitioners based their cause of action upon the provisions of 42 U.S.C. § 1983 since it is well established that the jurisdictional bar of 28 U.S.C. § 1341 applies equally to suits based upon the provisions of 42 U.S.C. § 1983 4

II. There is no real conflict between the decision of the United States Court of Appeals for the Eighth Circuit in the instant case and that of the United States Court of Appeals for the Seventh Circuit in the case of *Fulton Market Cold Storage Company* v. *Cullerton*, 582 F.2d 1071 (7th Cir. 1978), on the question of the applicability of the jurisdictional bar contained in 28 U.S.C. § 1341 5

Conclusion 8

Authorities

Cases:

Advertiser Company v. *Wallace*, 446 F.Supp. 677 (M.D. Ala. 1978) 8

American Commuter's Association v. *Levitt*, 405 F.2d 1148 (2nd Cir. 1969) 5

Bland v. *McHann*, 463 F.2d 21 (5th Cir. 1972), *cert. denied*, 410 U.S. 966 (1973) 6

Coon v. *Teasdale*, 567 F.2d 820 (8th Cir. 1977) 5

Evangelical Catholic Communion, Inc. v. *Thomas*, 373 F.Supp. 1342 (D.Vt. 1973), *aff'd*, 493 F.2d 1397 (2nd Cir. 1974) 7

Flato Realty Investments v. *City of Big Spring*, 388 F.Supp. 131 (N.D.Tex. 1975) 5

Fulton Market Cold Storage Company v. *Cullerton*, 582 F.2d 1071 (7th Cir. 1978) 2, 5, 6

Gray v. *Morgan*, 371 F.2d 172 (7th Cir. 1966) 7

Hickman v. *Wujick*, 488 F.2d 875 (2nd Cir. 1973) 8

Horn v. *O'Cheskey*, 378 F.Supp. 1280 (D.N.M. 1974) 8

Kelly v. *Springett*, 527 F.2d 1090 (9th Cir. 1975) 6

Kimmey v. *H. A. Berkheimer, Inc.*, 376 F.Supp. 49 (E.D.Penn. 1974), *aff'd*, 511 F.2d 1394 (3rd Cir. (1975) 5

Lynch v. *Household Finance Corporation*, 405 U.S. 538 (1972) 4

Mandel v. *Hutchinson*, 494 F.2d 364 (9th Cir. 1974) 5

Ott v. *Mississippi Valley Barge Line Company*, 336 U.S. 169 (1949) 7

United Gas Pipe Line Company v. *Whitman*, 595 F.2d 323 (5th Cir. 1979) 7

Statutes:

28 U.S.C. § 1341 .....2, 3, 4, 5, 6, 7, 8

42 U.S.C. § 1983 .....2, 4, 5

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BRIEF OF RESPONDENTS WILLIAMS, OTTO AND SNYDER IN OPPOSITION TO PETITION FOR CERTIORARI

The brief of respondents Donald G. Williams, Tom R. Otto, and Stephen C. Snyder, is in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit filed on September 17, 1980, by petitioners Fair Assessment in Real Estate Association, Inc., J. David Cassilly and Lynn F. Cassilly.

OPINIONS BELOW

The opinion of the Court of Appeals is reproduced in Petitioners' Appendix A and is reported at 622 F.2d 415. The opinion of the District Court is reproduced in Petitioners' Appendix B and is reported at 478 F.Supp. 1231.

JURISDICTION

The jurisdictional prerequisites are adequately set forth in the petition.

QUESTIONS PRESENTED

1. Whether the petitioners' characterization of their lawsuit as one based upon the provisions of 42 U.S.C. § 1983 citing interference with their property rights as an alleged result of overassessment of their real property situated in St. Louis County is sufficient to circumvent the jurisdictional bar of 28 U.S.C. § 1341.

2. Whether a concrete and significant conflict really exists between the decision of the United States Court of Appeals for the Eighth Circuit in the instant case and the decision of the United States Court of Appeals for the Seventh Circuit in *Fulton Market Cold Storage Company* v. *Cullerton*, 582 F.2d 1071 (7th Cir. 1978), *cert. denied*, 439 U.S. 1121 (1979) regarding the application of the jurisdictional bar contained in 28 U.S.C. § 1341.

STATUTES INVOLVED

The respondents believe that the statutory provisions involved in this case have been adequately set forth in the petition.

STATEMENT OF THE CASE

On July 2, 1979, the petitioners filed this action in the United States District Court for the Eastern District of Missouri. The petitioners based their action upon the provisions of 42 U.S.C. § 1983 and sought monetary relief of alleged violations by the respondents of their Fourteenth Amendment rights. In essence, the petitioners' complaint

sought monetary relief for alleged overpayments of their taxes in the years 1975 through 1979. The petitioners contended in their complaint that they had made these overpayments due to overassessments by the respondents during these tax years. The petitioners also sought punitive damages in the sum of $25,000.00 from the respondents.

On August 13, 1979, respondents McNary, Skaggs, Antonio, Pung and Schneider, filed their motion to dismiss the petitioners' complaint with suggestions in support thereof. On August 17, 1979, respondents Williams, Otto and Snyder filed their answer to the complaint of the petitioners. In their answer respondents Williams, Otto and Snyder also moved to dismiss petitioners' complaint for failure to state a cause of action upon which relief could be granted as to them.

On September 19, 1979, the petitioners filed a memorandum in opposition to the motion to dismiss of respondents McNary, Skaggs, Antonio, Pung and Schneider. Thereafter, on October 5, 1979, respondents McNary, Skaggs, Antonio, Pung and Schneider filed a reply to the petitioners' suggestions in opposition to their motion to dismiss.

On November 7, 1979, Judge John F. Nangle of the United States District Court for the Eastern District of Missouri, Eastern Division, entered his memorandum and order dismissing the complaint of the petitioners in its entirety. In essence, Judge Nangle based his decision to dismiss the petitioners' complaint upon the provisions of 28 U.S.C. § 1341.

On June 19, 1980, the United States Court of Appeals for the Eighth Circuit, En Banc, affirmed the judgment of the District Court. No separate opinion was issued by the Court of Appeals at the time of affirmance.

ARGUMENT

I.

The petition for certiorari should not be granted for the reason that the petitioners based their cause of action upon the provisions of 42 U.S.C. § 1983 since it is well established that the jurisdictional bar of 28 U.S.C. § 1341 applies equally to suits based upon the provisions of 42 U.S.C. § 1983.

The petitioners' first reason presented for this Court to grant their petition for certiorari in this case is a rather hysterical argument that since they sought to allege a cause of action in their original petition based upon 42 U.S.C. § 1983, they should have somehow been able to avoid the jurisdictional bar of 28 U.S.C. § 1341. On the contrary, respondents Williams, Otto and Snyder submit that the fact that the petitioners' contended in their complaint that their property rights were being interferred with due to alleged overassessments of their real property in St. Louis County, and sought to base their cause of action upon the provisions of 42 U.S.C. § 1983 did not ameliorate against the application of the jurisdictional bar contained in 28 U.S.C. § 1341 to this case.

It has been held on numerous occasions that the provisions of 28 U.S.C. § 1341 apply equally to lawsuits premised upon 42 U.S.C. § 1983. The effort of the petitioners to base their lawsuit on the provisions of 42 U.S.C. § 1983 in order to circumvent the jurisdictional bar of 28 U.S.C. § 1341 simply cannot withstand scrutiny.

In the case of *Lynch* v. *Household Finance Corporation*, 405 U.S. 538 (1972) this Court recognized the position that a plaintiff may not avoid the jurisdictional bar of 28 U.S.C. § 1341 simply by alleging a cause of action pursuant to the provisions of 42 U.S.C. § 1983. In *Lynch*

v. *Household Finance Corporation, supra,* this Court cited 28 U.S.C. § 1341 as an expression of congressional intent that district courts not interfere with the collection of any tax under state law as long as a plain, speedy and efficient remedy could be had in the state courts. This position has been repeatedly supported by the lower federal courts regardless of whether a plaintiff attempts to base his cause of action upon the provisions of 42 U.S.C. § 1983 or some other federal statutory scheme. See *Coon* v. *Teasdale,* 567 F.2d 820 (8th Cir. 1977); *Mandel* v. *Hutchinson,* 494 F.2d 364 (9th Cir. 1974); *American Commuter's Association* v. *Levitt,* 405 F.2d 1148 (2nd Cir. 1969); *Flato Reality Investments* v. *City of Big Spring,* 388 F.Supp. 131 (N.D.Tex. 1975); *Kimmey* v. *H. A. Berkheimer, Inc.,* 376 F.Supp. 49 (E.D.Penn. 1974), *aff'd,* 511 F.2d 1394 (3rd Cir. 1975).

Respondents Williams, Otto and Snyder submit that there is no reason for this Court to grant the petition for certiorari in the instant case based upon the first reason presented by the petitioners. There is simply no reason for this Court to review the well-established principle discussed above upon which there is no apparent disagreement among the federal courts.

II.

There is no real conflict between the decision of the United States Court of Appeals for the Eighth Circuit in the instant case and that of the United States Court of Appeals for the Seventh Circuit in the case of Fulton Market Cold Storage Company **v.** Cullerton, **582 F.2d 1071 (7th Cir. 1978), on the question of the applicability of the jurisdictional bar contained in 28 U.S.C. § 1341.**

As their second reason for granting certiorari, the petitioners urge this Court to accept the instant case because there is a conflict between the circuits on the question of

whether or not the jurisdictional bar of 28 U.S.C. § 1341 should be applied to a case of this type. In essence, the petitioners seek to strike a conflict between the decision of the United States Court of Appeals for the Eighth Circuit in this case, and that of the United States Court of Appeals for the Seventh Circuit in the case of *Fulton Market Cold Storage Company* v. *Cullerton,* 582 F.2d 1071 (7th Cir. 1978). Respondents Otto, Williams and Snyder submit that no real conflict exists between these two decisions of the Seventh and Eighth Circuit Courts of Appeal which justifies the granting of this petition.

In its opinion issued on June 19, 1980, the United States Court of Appeals for the Eighth Circuit, En Banc, merely affirmed the judgment of the District Court without issuing a separate opinion. In reaching its decision, the District Court held that although the petitioners characterized their suit as one for monetary damages, it was in reality a suit designed to obtain refunds of taxes allegedly overpaid in previous tax years due to overassessments of their real property in St. Louis County. The District Court held that the provisions of 28 U.S.C. § 1341 barred suits of the nature filed by petitioners as well as suits for entirely equitable relief in the form of injunction or declaratory judgment. In so doing, the district judge, the Honorable John F. Nangle, relied upon the decisions in *Kelly* v. *Springett,* 527 F.2d 1090 (9th Cir. 1975) and *Bland* v. *McHann,* 463 F.2d 21 (5th Cir. 1972), *cert. denied,* 410 U.S. 966 (1973). In reaching its result, the District Court distinguished the case of *Fulton Market Cold Storage Company* v. *Cullerton, supra,* on the ground that the *Fulton* case was clearly a cause of action for damages rather than one essentially for a tax refund. Indeed, an examination of the *Fulton Market Cold Storage* opinion reveals that the plaintiff therein was seeking $60,000.00 in unliquidated damages plus the damage to its business resulting from

the actions of the defendants therein along with punitive damages.

In reaching its decision that the petitioners' suit for a tax refund was barred by the provisions of 28 U.S.C. § 1341, the District Court reached a result consistent with that reached by the other federal courts of appeal on this issue. See *United Gas Pipe Line Company* v. *Whitman*, 595 F.2d 323 (5th Cir. 1979); *Kelly* v. *Springett, supra; United States* v. *State Tax Commission of the State of Mississippi*, 505 F.2d 633 (5th Cir. 1974); *Bland* v. *McHann, supra; Gray* v. *Morgan*, 371 F.2d 172 (7th Cir. 1966); *Evangelical Catholic Communion, Inc.* v. *Thomas*, 373 F.Supp. 1342 (D.Vt. 1973), *aff'd*, 493 F.2d 1397 (2nd Cir. 1974). As stated previously the Court of Appeals merely affirmed this result. In their petition, the petitioners are unable to cite any federal appellate court decision disagreeing with this proposition. The only cases cited by the petitioners which disagree with the position that the Tax Injunction Act bars a suit essentially for a tax refund are district court decisions. See Petition at p. 7. The petitioners' contention that this Court held "without comment" in *Ott* v. *Mississippi Valley Barge Line Company*, 336 U.S. 169 (1949) that tax refund cases are not barred by 28 U.S.C. § 1341 is simply absurd.

Respondents Williams, Otto and Snyder submit that the petitioners' attempt to obtain certiorari in this case based upon a concocted conflict between the decision of the United States Court of Appeals for the Eighth Circuit in the instant case and the decision of the United States Court of Appeals for the Seventh Circuit in the *Fulton Market Cold Storage* case must fail. The two cases are clearly distinguishable, and they did not reach divergent positions on the issue of whether or not the provisions of the Tax Injunction Act, 28 U.S.C. § 1341, should be applied as a bar to a lawsuit which is essentially one seek-

ing a tax refund due to alleged overassessments of real property in previous tax years.

In addition, even if this Court were to construe the decision of the United States Court of Appeals for the Eighth Circuit as holding that lawsuits for unliquidated damages are barred by 28 U.S.C. § 1341, respondents Williams, Otto and Snyder submit that this is the appropriate result and does not require review by this Court. See *Advertiser Company* v. *Wallace*, 446 F.Supp. 677 (M.D.Ala. 1978); *Hickmann* v. *Wujick*, 488 F.2d 875 (2nd Cir. 1973); *Horn* v. *O'Cheskey*, 378 F.Supp. 1280 (D.N.M. 1974); *Evangelical Catholic Communion, Inc.* v. *Thomas, supra.*

CONCLUSION

For the above-stated reasons, the petition for certiorari should be denied.

Respectfully submitted,

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